IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2855 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KISHOR KESHARI MATHURA

Versus

COMMISSIONER OF POLICE

Appearance:

MS KRISHNA U MISHRA for Petitioner

MR SJ DAVE, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 26/06/2000

ORAL JUDGEMENT

The petitioner has been detained under the provisions of Gujarat Prevention of Anti-Social Activities Act, 1985 (hereinafter referred to as `the Act of 1985') by the order dated 1-8-1999 passed by the Police Commissioner, Rajkot City and he has been declared

as bootlegger.

2. It is now well settled that unless the activities of a person as bootlegger has disturbed the maintenance of public order, he cannot be detained under the Act. Reliance is placed on a decision of the case of Piyush Kantilal Mehta Vs. Commissioner of Police, Ahmedabad & Ors. reported in AIR 1989 SC 491.

3. I have heard learned advocate for the petitioner, Ms.K.U.Mishra at length and also perused the material on record. She has mainly argued that authority has considered the single offence registered against the petitioner on 21-5-1999 wherein she has been released on bail on 23-5-1999. She has further submitted that representation has been sent by the petitioner on 6-4-2000 and same has been received by the Chief Minister on 10-4-200 which has been decided on 15-4-2000 and, therefore, there is a delay of five days and it has not been satisfactorily explained by the authority. She has also raised the contention regarding non-filing of reply for which she has relied upon a judgment of Division Bench of this Court in the case of Ashokbhai Jivraj @ Jivabhai Solanki Vs. Police Commissioner, Surat and Ors. reported in 2000(1) G.L.H. 393 which reads as under:

> "Before parting with the matter, we may observe that recently, we have come across few cases wherein no counter-affidavits are filed by the respondents. It is settled law that whenever an order of detention is challenged by a detenu or by his "next friend", it is the duty of the authorities to justify the action by filing counter-affidavit preferably by the detaining authority himself, unless there are circumstances which may justify filing of affidavit by an officer or authority other than the detaining authority".

4. Mr.S.J.Dave, learned APP has mainly argued that the representation has been received by the Chief Minister on 10-4-2000 and it has been decided on 15-4-2000 and, therefore, there is no delay.

5. But facts remain that no affidavit has been filed by the concerned authority explaining satisfactorily about the delay occurred in deciding the representation. It has been held in a case of Rajammal Vs. State of Tamil Nadu and another reported in AIR 1999 S.C. page 684 more particularly at head note which states as under:

"Detention-Unexplained delay of five days in considering and disposing detenu's representation-Mere absence of Minister at Headquarters not sufficient to justify delay-Detention vitiated."

The Apex Court quoted in the above referred judgment certain portion of a judgment delivered by a Constitutional Bench in K.M.Abdulla Kunhi and B.L.Abdul Khader V. Union of India, which reads thus:

"It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal".

It has been further held by the Apex Court in para 9 as

under:

"The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing the representation.It is not enough to say that the delay was very short. Even longer delay can as well be explained. so the test is not the duration or range of delay, but

how it is explained by the authority concerned."

6. In the instant case representation has been sent on 10-4-2000 but it remained undecided till 15-4-2000 and there was a delay of five days. In the judgment reported in Rajammal (supra), though there was a delay of five days only in considering and disposing detenu's representation, detention was held to be vitiated. Here in this case also, there was a delay of five days in considering the representation and no satisfactory explanation has been put forward by the respondents. Therefore, case of the petitioner is directly covered by the judgment of the Apex Court in the case of Rajammal (supra). Moreover, a solitary incident has been registered against the petitioner. On this ground also, the petition succeeds and, therefore, learned advocate for the petitioner does not press other points.

7. In view of the above, the petition is allowed. The order of detention dated 1-8-1999 passed against the petitioner-detenu is hereby quashed and set aside. The detenu-Kishore Keshari Mathura is ordered to be set at liberty forthwith, if not required to be detained in any other case. Rule is made absolute accordingly with no order as to costs.

(R.P.DHOLAKIA,J.)

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